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THE FUNCTION OF THE CORPORATE TRUSTEE IN THE PLANNING OF ESTATES

HENRY H. JUDSON*

"Let's choose executors and talk of wills:
And yet not so, for what can we bequeath
Save our deposed bodies to the ground?"

—Shakespeare, *Richard II*

SECURITY for one's self and one's dependents has been and probably always will be the chief objective of those who are earning a living or who have accumulated property. From the earliest dawn of history, the development of the family as a unit has been the great motivating force in man's desire to transmit property to the succeeding generations of those dependent on him for support. Varying with his wealth, the social structure of his environment, the laws and regulations with which he was surrounded, man's plans for safeguarding the future of his dependents have undergone many changes over generation after generation, but always the basic desire to pass on his possessions for the benefit of those near and dear to him when he has gone to that bourne from which no traveler returns has been an integral characteristic of the human race. In the earliest days an Estate Plan was merely a search for the easiest and most effective means to transmit tangible personal property from one generation to the next. With the advent of diversified types of wealth, the increasing complexities of the economic structure, development of legal devices and statutory enactments, changing trends and theories of governmental emphasis on the social fabric through the power of taxation, estate planning has become a complex and involved problem, meriting the most careful consideration and best advice obtainable. The basic purpose of any plan for an individual's estate is to provide for the economic settlement of the estate and for its orderly and practical distribution in a manner commensurate with the personal requirements and economic needs of the beneficiaries. There can be no denying the importance of an orderly arrangement of family and business affairs in a nation such as ours, founded upon family tradition and dedicated to the preservation of individual enterprise.

Toward the close of the nineteenth century the planning of an estate consisted chiefly of the careful drafting of a will, possibly containing

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trust provisions for the protection of beneficiaries unversed in business affairs. It was during those years that Oliver Wendell Holmes wrote in *The Autocrat of the Breakfast Table*. "Put not your trust in money, but put your money in trust." Income, estate, and inheritance taxes were unknown. But now, fifty years later, with few exceptions, great wealth among individuals in this country is history. Wealth accumulated in the past is being divided and subdivided, and new wealth is more difficult to acquire and retain. This trend is due largely to the leveling effects of taxation, the accompanying lowered returns on invested capital, and the lessened purchasing power of the dollar all of which have had their effect on the planning of estates.

Due to lowering of exemptions and increase of rates, the federal estate tax on a net estate of \$125,000, which would have been tax free in 1930, is now \$10,900. The federal tax on an estate of \$500,000 was \$10,900 in 1930, \$71,200 in 1939, and \$126,500 today. Imposed and reimposed on a succession of transfers, taxes have cut deeply into the original values of large estates. In addition, because of the effect of high income and estate taxes, there has been a widespread transfer of property by gift—the Bureau of Internal Revenue reporting a gross total of over seven billion dollars in gifts during the last ten years—which, aside from the small amount exempted, is in turn subject to taxation. Over the past ten years the combined effect of all these factors has been to lower the spendable investment income by the beneficiary of an estate, expressed in terms of purchasing power, by some two-thirds. For example:

	1939	1949
Net estate.....	\$200,000	\$200,000
Estate tax.....	13,000	32,700
Estate to beneficiary.....	187,000	167,300
Return on capital.....	4 percent	3½ percent
Gross income.....	7,480	5,856
Income tax.....	330	872
Spendable dollars.....	7,150	4,984
Dollar value.....	100 percent	50 percent
Purchasing power.....	7,150	2,492

Thus, for the estate owner, economy is essential during life and equally essential upon death. Estate taxes and administration expenses

are costly in themselves and even more so due to the fact that they must be paid in cash. A succession of them is not economical, and since their repetition may be avoided by the use of a testamentary trust the use of trusts has become increasingly popular. However, taxation, although important, is only one item in the search for economy and in the trend to trusts. Of far greater significance in most instances is a desire on the part of the property owner to protect his accumulated capital for the benefit of his family. With some exceptions, depending on the age, disposition and needs of the beneficiaries, a trust combines, in a manner almost unique, a degree of flexibility and protection that can be secured in no other way. In order to secure this flexibility, more and more discretion has been accorded the trustee and thus increasing care has been necessary in selecting the proper trustee to act over a long period of years. Due to its known and continuing financial responsibility, perpetual existence, experienced and trained personnel, and constant availability irrespective of the human factors of illness, absence or death, the tendency has been to turn more and more to the corporate trustee—a bank or trust company—and to make greater and greater use of its facilities.

Modern trust business is that of settling estates and of conducting and managing trusts and agencies for individuals, corporations, and charitable foundations. The corporate trustee derives its trust powers from the state, subject to Federal Reserve or National Banking regulation, depending on membership. It is the bank or trust company which exercises the trust powers and these particular powers are exercised by and through the Board of Directors and the committees of that Board. Under the usual organization plan, the trust committee, composed of a number of directors, is responsible for the conduct and management of the trust department, the committee system being an integral part of the operation. Emphasis is placed on group, not individual, judgment and all major decisions affecting trusts—including the purchase and sale of securities, the review of investments to determine their safety and continued income producing ability—are made by the joint decision of a number of experienced directors and officers, meeting together and exchanging ideas.

The committee meets regularly and reviews periodically the assets held in each trust, and, consequently, each account under administration receives the benefit of the joint judgment and experience of directors and senior executive officers. While safety of principal and

dependability of income are governing factors of investment policy, rather than a hope or expectation of speculative gain, nevertheless the reasonable income requirements of beneficiaries are of prime importance. Minutes are kept of all group decisions made with the reasons therefor, and these, in turn, are reviewed by the executive committee of the bank, and finally are presented in summary form at each meeting of the board of directors. Thus, over and above the physical safeguards of dual safe deposit control, continuous audit, and meticulous examination by federal and state authorities, trusts receive the full attention of experienced directors and senior officers. All matters concerning trust affairs are held in absolute confidence.

The bank as trustee is concerned with the business phases of the trusts under its management. Primarily it deals with the money and property of the various trust accounts entrusted to its care. Each trust may well be likened to a business of its own, a complete entity, managed for its owner by the trustee in accordance with the written directions of the trust instrument. In such management, the sole and only consideration of the trustee is the best interests of the trust and the bank's duty and obligation is to use such prudent and diligent judgment that the trust assets will produce a fair income return commensurate with safety of principal. Due to the nature of the business, the well-trained and experienced trust officer is accustomed to call for expert and specialized advice in the management of trust assets. In legal matters—and the trust business is fraught with legal questions—he consults the attorney who drew the will or agreement under which the bank is acting. For advice concerning life insurance, he goes to the life insurance representative, who is skilled on the subject. For information concerning tax matters, forms of tax returns and complicated valuations, he confers with the accountant who has acted for the particular customer. It is common everyday practice to call for expert opinions, on which to base a decision affecting the estate or trust. Thus of necessity, by such dealings over a period of years, the trust man himself must obtain a degree of specialized knowledge by which he himself may weigh and judge the questions before him. In the best use of that term, he must become a jack-of-all-trades to the extent that he possesses sufficient information to enable him to know when an expert should be consulted and how to weigh and evaluate the advice received in light of the other factors bearing on the problem at hand.

As in the present administration of an estate, the future planning of an estate calls for expert, specialized advice. Estates may be composed of an almost infinite variety of assets, from which a myriad of tax implications may arise and any plan for their disposition and management is subject to the laws, statutes and legal decisions in force and the possibility of future changes therein. To effectuate any plan, some legal document or documents—a will, a trust, a gift, or an agreement—are necessary. This phase falls within the purview of the attorney. It is he who should, and must, draw the documents to implement the plan and it is he who must take the responsibility for its legal effectiveness. On the other hand, it is the corporate trustee who should and must take the responsibility for the practical management of the estate and its effectiveness as a business proposition to bring about the desired financial results in ultimate benefits to those who are to share in it. Working with the trust officer, who represents the corporate trustee, are the life insurance representative and the certified public accountant, each advising concerning and taking the responsibility for his respective fields. The attorney must view the over-all picture for the best good of his client, with particular emphasis on its legal effects and implement it by the proper legal instruments. The trust officer must do the same with particular emphasis on the practical and business effects. The work of each supplements and correlates that of the other.

Estate planning often has been referred to as a team effort of specialists—the attorney, life insurance man, certified public accountant, and trust officer—all working together in a joint effort to accomplish one desired result, the planning of the disposition of the property of an individual so that his family may ultimately receive maximum benefit. In this analogy the attorney is often very properly called the captain of the team, and if so, certainly the trust officer is either the utility man, the coach at third base, or the pinch hitter. The apocryphal story is related in a national journal of the rich and irascible customer who telephoned his bank that he wanted to set up a very sizable trust. Said he: "I have no time to waste and I know you can't handle it personally, but I will come over this afternoon if you will have your people on hand. You will need a good lawyer, a qualified accountant, a tax expert, a first-class insurance man and someone thoroughly qualified to manage my properties." Before he had quite finished, he was interrupted: "Very well. At 2 30 we will have our trust officer here." This instance could not have happened here, but if it had, the customer

would have been surprised at 2 30 to meet in addition to the trust officer, his own attorney, his own accountant, and his own life insurance counselor, all called in by the trust officer.

It is unfortunate that a great part of the initial impetus toward estate planning came about as a result of the inroads of increasing taxation on estates. This has led to an undue and oftentimes improper emphasis on tax saving, resulting in plans that are warped from their true purpose and consequently lending a connotation of improper tax evasion, rather than proper tax avoidance, to the enterprise. In turn the Revenue Act of 1948 has poured more fuel on this flame, adding more confusion in the state of Washington.

Since its passage last April, a great deal has been written about the Federal Revenue Act of 1948, much of it has been complicated, much of it confusing. Sufficient time has now elapsed, however, to enable us to make a general survey of the new tax provisions and possibly to get a proper perspective as to their application to community property states such as Washington.

Speaking broadly, the intent of the Act is to equalize, as nearly as possible, federal income, estate and gift taxes between the community property states (in which a husband and wife have equal ownership rights in all property earned by either after marriage) and the non-community property states (in which property rights may be in either the husband or wife alone). This intent was accomplished by restoring to the married citizens of community property states their equal ownership of community property for tax purposes and by granting to married citizens of noncommunity property states the right to save death taxes on half of their property, provided that half was willed to the survivor either outright or in trust under certain conditions. This latter right also extends to the separate property owned by married citizens of community property states. In Washington, the separate property of married persons is that which was acquired prior to marriage or acquired after marriage by gift or inheritance.

Again speaking broadly, most of the property of married couples in Washington is community property. It is only in the rather exceptional case that separate property is owned by either husband or wife. Bearing this in mind, the following points appear to be pertinent in considering the Federal Revenue Act of 1948 as it affects our own personal affairs:

1. The provisions of the Act are complicated. This makes it all the more advisable to have the attorney draw the will or agreement and to discuss with him any gifts contemplated.

2. All income may be split between husband and wife for federal income and purposes.

3. For federal estate and gift tax purposes, community property has been restored to the status which it held prior to the Revenue Act of 1942. Now, as then, only one-half of it is subject to tax on the death of either husband or wife, and a gift of community property is considered to be made half by the husband and half by the wife, thus doubling the \$3,000 gift tax exemption.

4. Certain tax advantages have accrued to separate property. Half of such property may be left outright or in trust under certain conditions for a surviving spouse free from the estate tax. This tax-free half is known as the "marital deduction," and it is also applicable, gift tax wise, either to outright gifts or gifts under certain trusts from one spouse to the other.

5. For income tax purposes, the community half of an estate belonging to the surviving spouse acquires a cost basis equal to that of the deceased spouse's half.

6. The credit for property previously taxed within a five year period is no longer available for property received from a spouse who died after December 31, 1947.

These are the general provisions of the Act which are most important, and from these, certain conclusions may be drawn. Since the Act is a revenue act, great emphasis has been placed on the tax-saving possibilities which it affords in the planning and disposition of estates. This is in spite of the fact that on analysis much of the so called tax-saving is found rather to be tax deferment. It should be emphasized most strongly, however, that in estate and gift planning, family security is paramount and tax-saving secondary. If taxes may be saved, that is an additional advantage, but the primary consideration in the disposition of an estate is the best good of the dependents and beneficiaries. The customer's hopes and aspirations for them, their financial security, their needs and the best methods to accomplish the fulfillment of those needs are the factors to be considered first. In such family planning, the trust officer should join with the customer, his attorney, his life insurance adviser and accountant. The attorney is skilled in legal affairs; the trust officer has much business experience in settling many estates; the life insurance adviser knows the insurance needs. The accountant has much information on tax matters. All have much to contribute in peace of mind in properly orienting an estate to accom-

plish the customer's wishes for the future welfare and benefit of his family

In considering the disposition of an estate, one should bear in mind.

1. That in disposing of community property probably the best method for family security and for tax-saving is by means of a testamentary trust to protect the wife for her lifetime and under which the property will eventually be distributed tax-free to the children.

2. That in disposing of separate property, probably the best method for family security and for tax-saving is by two testamentary trusts. Both trusts would provide income to the wife during her lifetime. Under one trust, she would have power to dispose of the principal, and the principal of this trust will be tax-free upon the customer's death. Under the other, eventual distribution would be to the children, and this will be tax-free at the wife's death.

3. There are many other plans for property distribution being discussed. Many, however, are complicated and involved and their long-term tax-saving probabilities doubtful. In general, the simple, straight-forward plan that reasonably accomplishes the particular objectives desired, usually attains the best ultimate results over a long period.

Another unfortunate connotation comes from the very name "estate planning." To many this implies first, large wealth, and second, an intricate proceeding fraught with expense. As a matter of fact, estate planning in its proper sense is more important to the family of small means than to the wealthy. It matters not whether the plan be merely mutual wills of husband and wife; whether these wills include a contingent trust for the benefit of a child, only to be effective on the death of both parents; whether it includes a contingent life insurance trust for the same purpose and under the same circumstances; or whether the estate merits long and expert examination of legal, insurance and tax angles with an intricate solution of wills, trusts under will, powers of appointment, marital deductions, lifetime gifts, irrevocable trusts, funded insurance trusts, insurance owned by the other spouse, business buy-and-sell agreements, business insurance trusts, and key man insurance. Be it simple or be it complicated, it is still an estate plan and it merits the best thought and advice of any and all members of the estate planning team. As a consequence, the potential field for such service is unlimited. The attorney may well—and should—call the attention of his client to the advisability of reviewing his will. The life insurance man may well ask his prospect "Have you a will?" The accountant

may well suggest estate changes on account of the impact of additional taxes.

The primary role in the initiation of an estate planning situation may fall to any number of the team. Thus, dependent on that fact and on the size, simplicity, or intricacy of the estate involved, the part played by any one member may be major or minor. The advice and services of the attorney are always a prime requisite, for wills, and possibly other legal documents, must be drawn. Usually life insurance is, or should be, a part of the estate, and thus the life insurance man will be drawn into the picture. The information the accountant possesses concerning an individual's tax affairs is always of value, but if the particular estate is one of such size and complexity that problems of valuation and of intricate tax returns arise, his knowledge and advice are invaluable. The participation of the trust man will depend on the need for fiduciary service in the estate plan.

Irrespective of the importance of any one member, the fact that estate planning is a team effort should never be lost sight of. The best good of the customer is the paramount objective and the skill and knowledge of all team members should be pooled to attain that goal. Thus, it is the responsibility of each to call for expert advice in matters that fall in the respective fields of the others and to keep them informed as the plan proceeds and is moulded into final form. For, example, no changes should be made in insurance optional settlements without calling for the opinion of the insurance man. Similarly nothing should be done that affects the form of tax returns without consultation with the accountant who has been accustomed to prepare those returns. Certainly no corporate trustee should be called upon to act under any will or agreement without having an opportunity to assist in formulating the business and practical phases of the instrument which sets forth the rights, powers and duties by which the trustee must effect a sound and beneficial administration of its trust.

Due to the fact that he is in the business of administering estates and managing trusts, the trust officer probably has as much if not more opportunity to initiate interest in estate planning as any other member of the team. Customers of the bank naturally turn to him in the first instance for general information along such lines. It is here that the utility value of his training comes into play. The trust officer feels that his place is to gather the information necessary to evaluate the situation and that primarily he should cement the relationship between the cus-

tomers and the customer's own attorney, insurance counselor or accountant. The trust officer does not furnish legal advice or draw legal instruments. Many times he has occasion to advise the customer strongly against drawing his own will and to caution him in equally cogent terms to consult a lawyer of his own choosing. He explains that in acting under a will or trust the bank employs the attorney who drew the document, provided the customer leaves no instructions to the contrary. Similar methods are followed in matters concerning insurance and accountancy.

If the customer's situation is other than one of extreme simplicity, the trust officer will proceed to obtain the data which must be had in order to work out a plan suited to the particular case at hand. Whatever the plan ultimately developed, it must be based on the customer's family and financial situation and on his specific objectives. Just as an architect in planning a home must know the topography of the lot on which it is to be built, its location and size, the amount which the owner can afford to spend, and those whom the dwelling is to house and their relationships, before he can draw even the most tentative of plans, so the estate planner must know the size and constituency of the estate, those whom its owner wishes to benefit and his aims and aspirations for them, before he can apply the tools of the estate planning trade to outline a plan for economic and beneficial distribution.

Consequently the trust officer first learns from his customer those for whom he wishes to plan. This information consists generally of the names, ages, and relationships, distinctive characteristics, domicile and financial situation of the family and of any other dependents. The trust officer will also wish to know if any charities are to be benefited, as well as the customer's general objectives for his estate. Usually these will be that he wishes his estate conserved for the benefit of his wife and children and taxes reduced, all without present tax cost, if possible, and in such a manner that there is complete freedom of action to meet future contingencies.

Next, the trust officer needs complete information on the customer's present financial situation. This not only includes his worth and of what his estate is composed but also like information for all other members of the family group. Often a check list is used to develop this information and the following items might well be included.

ASSETS (owned by husband, wife, and other beneficiaries—community and separate property—cost and market value)

Tangible personalty

home	jewelry
furnishings	objects of art
autos	hobbies

Cash

checking—type of account
savings—type of account

Securities

bonds (liquid, nonliquid)
U.S. Savings Bonds (how registered)
stocks (liquid, nonliquid)
notes and mortgages
contracts

Real estate (taxes, income, etc.)

Life Insurance (type and mode of settlement)

Business ownership (corporate form) (business insurance—buy and sell agreement)

Existing trust funds

Expectancies

Powers of Appointment

Other property

LIABILITIES

Debts

unsecured
secured

Other liabilities

INCOME

securities	business
real estate	trust funds
salary	

OBLIGATIONS

interest on loans
taxes
real estate
income

other
 other
 GIFTS MADE (and to whom)

The trust officer will wish to learn the names of the customer's attorney, life insurance adviser, and accountant and obtain the customer's permission to consult with them. He will wish to know if there are present wills and their general content.

With this data in hand, it may then be put in memorandum form and summarized by amount, including a preliminary tax summary, as follows:

Estimated net liquid assets	.....
Estimated net nonliquid assets	.....
Life insurance	.....
Estimated net worth		.....
Costs administration	.....
Debts payable in cash	.....
Federal estate taxes	.....
State inheritance taxes	.....
Total cash requirements		.....
Balance to beneficiaries		.....

The trust officer may now wish to develop further detailed information from the attorney, insurance counselor, or accountant, but in any event he is in position to know in a general way his customer's family objectives, his present financial situation, and the monetary effect which cash payment of costs of administration, debts, and taxes will have on his estate under his present will. He also knows the financial situation of the other members of the family and their holdings of community or separate property. He is in a position to see whether the estate is sufficiently liquid to defray the costs of death or whether nonliquid assets will have to be disposed of at forced sale. In other words, he may now survey the general situation of the estate, in light of present facts and known objectives, and make a preliminary analysis of remedies to rectify what may be wrong and to attain as nearly as possible the results desired, bearing in mind that usually simple, clear-cut plans are best; that freedom should be retained to make changes in the future to meet changed family situations; that there should be

no present tax costs, unless unavoidable; and that family protection and well being is paramount to mere tax-saving per se.

The trust man knows that certain tools may be used to attain certain objectives and that from among others he may choose:

- | | |
|---|--|
| <i>To obtain liquidity</i> | <i>To provide cash for taxes and costs</i> |
| sell present assets | purchase life insurance |
| purchase life insurance | life insurance trust |
| <i>To provide family protection</i> | <i>To eliminate "second" tax</i> |
| trust under will | trust under will |
| living trust | |
| life insurance options | |
| life insurance trust | |
| annuity | |
| <i>To reduce taxes</i> | |
| gifts (direct or in trust) | |
| trust under will | |
| powers of appointment | |
| life insurance trust | |
| marital deduction under 1948 Revenue Act | |
| <i>To obtain liquidity in closely held businesses</i> | |
| buy and sell agreements | business life insurance trust |
| key man life insurance | change in legal form |
| business life insurance | change in capital form |

The above list could be expanded almost indefinitely, but it will be illustrative.

Making use of such of these tools as may be applicable, the trust officer will amplify his memorandum to include preliminary recommendations looking toward a completed estate plan, knowing that his ideas are subject to revision after consultation with the other team members, either by reason of further facts developed or legal angles or other suggestions made. Preferably a conference will be had after the attorney, insurance counselor, and accountant have received copies of the memorandum and had an opportunity to study it and possibly to discuss it with the customer, who very often is present as well. In any event as a result of the pooled ideas of the team, the trust man is in position to make a recommendation to his customer knowing that it includes the best judgment of all the specialists who have been consulted. If the recommendation is agreeable to the customer, the matter

will be referred to the attorney to draft the necessary documents to complete the plan. If insurance is to be purchased or options changed, these will be handled by the life insurance adviser. The accountant will take care of any changes in accounting methods or tax practices.

It should be emphasized that no charge is made by the bank of any description for its services in the planning of estates. It may or may not be named in a fiduciary capacity under the will that may result. It may or may not be the recipient of a present trust. But in no event is there any cost or obligation to the customer.

In summary, it may be said that transmission of property from one generation to the next in such manner as best to conserve it for dependents is of prime importance in furthering our system of free enterprise. The method used—an estate plan—is properly a team effort of those best designed to formulate and implement it. The team is usually composed of the attorney, the life insurance adviser, the accountant and the trust officer of the customer's bank. The attorney may well be considered the captain of the team and the trust officer its utility man. Each member has to do primarily with his own specialized field—that of the corporate trustee comprises the business and financial realm, and in its daily work it is in close contact with the other fields but does not trespass within them.

In all estate plans certain basic philosophies apply. The plan should be as simple as possible to accomplish the desired result. None of it should be inflexible unless there are incontrovertible reasons. Liquidity is paramount. Taxes should be saved wherever possible but never at the expense of family security. If a trust is called for, the trustee should be given latitude to meet future unforeseen emergencies. Estate planning should include life planning as well as death planning, and is equally important to the small as well as the large estate.

And one final thought. The phrase "Nothing is static except change" is credited to Herodotus. No truer statement could be applied to estate planning. Economic conditions, family situations, personal business affairs—all are continuously in a state of flux. Estate plans should be as elastic as possible so as to bend in meeting these changes without breaking. But beyond that, all plans should be reviewed periodically to ascertain if they are as applicable to the present as they were to the past. A birth, death, marriage, business success or failure in the family is a signal to review one's plans for the future well being of those for whom one wishes to provide.